No. 08-643

In the Supreme Court of the United States

HENRY A. CANALES-MATAMOROS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
DONALD E. KEENER
JENNIFER J. KEENEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the North Carolina offense of taking indecent liberties with a child constitutes "sexual abuse of a minor," and therefore qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the *Federal Reporter* but is reprinted in 284 Fed. Appx. 800. The decisions of the Board of Immigration Appeals (Pet. App. 7a-11a) and the immigration judge (Pet. App. 12a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2008. A petition for rehearing was denied on August 14, 2008 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on November 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Honduras who became a lawful permanent resident of the United States in 2000. Pet. App. 13a.

In 2006, petitioner was convicted of taking indecent liberties with a child in violation of North Carolina law, N.C. Gen. Stat. § 14-202.1 (2007). Pet. App. 9a-10a, 13a. Section 14-202.1 provides, in pertinent part:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a) (2007). Violation of the indecent liberties statute is a felony. *Id.* §§ 14-202.1(b), 15A-1340.17(c) and (d). Petitioner received a suspended sentence of 16 to 20 months of imprisonment and 24 months of supervised probation. He was also ordered to have no contact with the victim and to complete a sex offender program. Gov't C.A. Br. 6.

2. The Department of Homeland Security (DHS) subsequently commenced removal proceedings against petitioner. DHS charged that petitioner was removable pursuant to 8 U.S.C. 1101(a)(43)(A) and

1227(a)(2)(A)(iii), as an alien convicted of an "aggravated felony," namely, "sexual abuse of a minor." Pet. App. 2a.

Petitioner admitted the allegations, and the immigration judge found him removable as charged. Pet. App. 12a-13a. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. *Id.* at 7a-11a. The BIA concluded that "[t]he plain language of the North Carolina statute indicates that a violation of the statute necessarily constitutes sexual abuse of a minor," relying on its own prior decision in *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (1997), which held that sexual abuse of a minor is not limited to offenses involving physical contact, and the Eleventh Circuit's decision in *Bahar* v. *Ashcroft*, 264 F.3d 1309 (2001), which held that a violation of the North Carolina indecent liberties statute constitutes an aggravated felony involving sexual abuse of a minor. Pet. App. 10a; *id.* at 8a-11a.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-6a. The court concluded that petitioner's challenge to the characterization of his offense as sexual abuse of a minor was foreclosed by *Bahar*. *Id.* at 5a; see *Bahar*, 264 F.3d at 1313.

ARGUMENT

Petitioner renews his contention (Pet. 5-21) that his North Carolina felony conviction for taking indecent liberties with a child does not constitute sexual abuse of a minor under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(A), and therefore does not qualify as an aggravated felony. The court of appeals correctly rejected that contention, and although its reasoning is in tension with the reasoning of a recent Ninth Circuit decision, there is no square conflict. Further review is not warranted.

1. In *Bahar* v. *Ashcroft*, 264 F.3d 1309 (11th Cir. 2001), on which the court below relied (Pet. App. 5a), the court of appeals correctly concluded that the North Carolina offense of taking indecent liberties with a child qualifies as sexual abuse of a minor under Section 1101(a)(43)(A).

a. The court in *Bahar* explained that because "no explicit statutory reference exists in 8 U.S.C. § 1101(a)(43)(A) defining 'sexual abuse of a minor,'" Congress intended "courts to rely on the plain meaning of the term." 264 F.3d at 1311. That plain meaning, the court concluded, reaches "a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." *Id.* at 1312 (quoting *United States* v. *Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001)). As the court explained, the term is not limited to offenses involving sexual physical contact; in ordinary usage, the term "includes not only acts that involve physical contact between the perpetrator and the victim, but also acts that do not." *Id.* at 1311.

The court thus concluded that the North Carolina statute categorically qualifies as one prohibiting "sexual abuse of a minor," even though it does not require physical contact between the perpetrator and the victim, because it requires that the perpetrator have engaged in an indecent or lewd and lascivious act on a child younger than 16 years (and five years younger than the perpetrator) "willfully" and "for the purposes of arousing or gratifying sexual desire." *Bahar*, 264 F.3d at 1311 (citing N.C. Gen. Stat. § 14-202.1(a)(1)).

b. As the court of appeals in this case noted (Pet. App. 5a), the *Bahar* court also correctly considered, and deferred to, the BIA's interpretation of the term "sexual

abuse of a minor" in *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (1999).

In *Rodriguez-Rodriguez*, the BIA held that the Texas offense of indecency with a child by exposure constitutes sexual abuse of a minor, even though it does not require physical contact between the perpetrator and the victim. 22 I. & N. Dec. at 996. The BIA rejected the argument that the term "sexual abuse of a minor" in the INA implicitly incorporates the definition of the terms "sexual abuse" and "sexual abuse of a minor or ward" in the federal crimes described in 18 U.S.C. 2242 and 2243, which require either a "sexual act" or "sexual contact," terms defined in the statute to refer to physical contact with specific body parts of the victim. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996; see 18 U.S.C. 2246(2) and (3). The BIA explained that, because Congress did not explicitly cross-reference any provision of federal law in Section 1101(a)(43)(A), the BIA was "not obliged to adopt a federal or state statutory provision" to supply the definition of sexual abuse of a minor. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994. The BIA further explained that, because "states categorize and define sex crimes against children in many different ways," the definitions of the federal offenses in Sections 2242 and 2243 were "too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse and the diverse types of conduct that would fit within the term as it commonly is used." *Id.* at 996.

The BIA noted, however, that a different provision of federal law, 18 U.S.C. 3509(a), which concerns procedural protections for child victims and witnesses, defines "sexual abuse" more broadly: that is, as "the employment, use, persuasion, inducement, enticement, or coer-

cion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995 (quoting 18 U.S.C. 3509(a)(8)). That definition, the BIA noted, is more consistent with the dictionary definition of "sexual abuse," which "suggests that the common usage of the term includes a broad range of maltreatment of a sexual nature, and * * * does not indicate that contact is a limiting factor." *Id.* at 996 (citing *Black's Law Dictionary* 1375 (6th ed. 1990)). The BIA thus identified Section 3509(a)(8) as "a useful identification of the forms of sexual abuse" covered by Section 1101(a)(43)(A), and concluded that "sexual abuse of a minor" under Section 1101(a)(43)(A) does not require proof of physical contact with the victim. *Id.* at 995-996.

The BIA's construction of the term "sexual abuse of a minor" as it appears in the INA is reasonable, and thus entitled to deference under *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

2. Petitioner contends (Pet. 13-19) that the "decision below contravenes the plain language of the [INA]" because it "allow[s] deportation for conviction of an aggravated felony based upon a statute that does not define a crime," namely, 18 U.S.C. 3509. Petitioner further contends that the court should have applied the federal criminal definition of "sexual abuse of a minor" in 18 U.S.C. 2243, which, unlike the North Carolina indecent liberties statute, requires proof of a "sexual act," a term defined to mean various forms of direct genital contact, 18 U.S.C. 2246(2), and allows defendants to raise a

mistake-of-age defense, 18 U.S.C. 2243(c). Petitioner's contentions are incorrect.

a. As an initial matter, neither the decision below nor the court of appeals' earlier decision in *Bahar* "allow[s] deportation * * * based upon" Section 3509, Pet. 13. The decisions instead rest on the court's conclusion that petitioner's crime falls within the ordinary meaning of the term "sexual abuse of a minor" in Section 1101(a)(43)(A). As the court of appeals correctly concluded, the ordinary meaning of that term is not limited to offenses involving physical contact, much less to offenses involving a "sexual act" as that term is defined in 18 U.S.C. 2246(2). Pet. App. 5a; see *Bahar*, 264 F.3d at 1311.

To be sure, the court of appeals also considered (Pet. App. 5a), and deferred to, the BIA's decision in *Rodriguez-Rodriguez*, which does rely on Section 3509. But the decision in *Rodriguez-Rodriguez* makes clear that the BIA did not consider itself "obliged to adopt [any] federal * * * statutory provision" to supply the definition of "sexual abuse of a minor," nor did it "adopt[] [Section 3509] as a definitive standard or definition." 22 I. & N. Dec. at 994, 996. The BIA instead explained that it looked to Section 3509 as a useful guide to the range of conduct encompassed by the term "sexual abuse of a minor" precisely because Section 3509's definition of "sexual abuse" is consistent with the ordinary meaning of the term. *Id.* at 996; see *Mugalli* v. *Ashcroft*, 258 F.3d 52, 58 (2d Cir. 2001) (agreeing that "the § 3509(a) definition is appropriate not simply because it appears somewhere in the United States Code, but because it is consonant with the generally understood broad meaning of the term 'sexual abuse'").

b. To the extent petitioner presumes (Pet. 13-15) that Section 1101(a)(43)(A) *requires* the BIA and courts to adopt a pre-existing federal criminal definition of "sexual abuse of a minor," petitioner is incorrect. See, *e.g.*, *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994; see also *id.* at 998 (dissenting opinion of Member Filppu). A number of the subparagraphs of the aggravated felony definition in 8 U.S.C. 1101(a)(43) do explicitly refer to certain federal criminal definitions. See, *e.g.*, 8 U.S.C. 1101(a)(43)(B) ("illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18"); 8 U.S.C. 1101(a)(43)(D) ("an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000"); 8 U.S.C. 1101(a)(43)(F) ("a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year"); see also *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995 n.1 (citing additional statutory provisions). Section 1101(a)(43)(A), however, contains no such reference.

Congress's omission of a federal statutory cross-reference in Section 1101(a)(43)(A) is significant. When Congress has intended to incorporate a federal definition of a particular offense, it has done so explicitly. Congress's decision not to do so in Section 1101(a)(43)(A) should be given effect. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and pur-

posely in the disparate inclusion or exclusion.") (citation omitted).[1]

Practical considerations also weigh strongly against petitioner's proposal that Section 1101(a)(43)(A)'s reference to "sexual abuse of a minor" be confined to the definition of the federal criminal "sexual abuse of a minor" offense under Section 2243. Cf. *United States* v. *Hayes*, No. 07-608 (Feb. 24, 2009), slip op. 10-11. Such an interpretation would mean that only persons convicted of crimes involving direct genital contact would be removable. 18 U.S.C. 2243, 2246(2). It would also have the absurd result of excluding any offense involving a minor under the age of 12. See 18 U.S.C. 2243(a)(1) (defining "sexual abuse of a minor" as a "sexual act" with a person who "has attained the age of 12 years but has not attained the age of 16 years"). Cf. 18 U.S.C. 2241(c) and 2244(c) (punishing offenses involving children younger than 12 years as the distinct federal offenses of "aggra-

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[1] Petitioner notes (Pet. 15-16) that, in the same omnibus appropriations act in which Congress amended Section 1101(a)(43)(A) to include "sexual abuse of a minor" as an "aggravated felony," see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 321, 110 Stat. 3009-627, Congress also enacted the Amber Hagerman Child Protection Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 121(7), 110 Stat. 3009-31, which, among other things, amended 18 U.S.C. 2243 to expand its geographic reach. Petitioner contends (Pet. 16) that the simultaneous enactment of those provisions demonstrates that the Congress that added "sexual abuse of a minor" to the list of removable aggravated felonies was aware of Section 2243. Petitioner further contends (Pet. 15-16) that the enactment history supports the conclusion that 18 U.S.C. 2243 and 2246 "should provide the operative definition for 'sexual abuse of a minor.'" The text of Section 1101(a)(43)(A), however, contains no suggestion that Congress intended to incorporate the Section 2243 definition, and petitioner cites no legislative history indicating that, despite the statute's silence, Congress nevertheless intended that result.

vated sexual abuse" or "abusive sexual contact"). Such a constrained interpretation of Section 1101(a)(43)(A) is "not consistent with Congress' intent to remove aliens who are sexually abusive toward children and to bar them from any relief." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996.[2]

c. Petitioner contends (Pet. 16-18) that the court of appeals erred in deferring to the BIA's decision in *Rodriguez-Rodriguez*. That, too, is incorrect.

First, although it is true (see Pet. 16-17) that *Rodriguez-Rodriguez* did not purport to advance a comprehensive construction of the term "sexual abuse of a minor" under Section 1101(a)(43)(A), it did conclusively reject the primary argument petitioner makes here (Pet. 19): that "sexual abuse of a minor" is limited to offenses involving a "sexual act," as that term is defined in 18 U.S.C. 2243 and 2246. See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996. That decision represents a reasonable construction of the statute the BIA administers, and it is entitled to deference. See *Aguirre-Aguirre*, 526 U.S. at 424-425.

Second, although it also is true that the BIA has no authority to interpret criminal law (see Pet. 17-18), Sec-

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[2] Petitioner argues only that Section 1101(a)(43)(A) incorporates the definition of "sexual abuse of a minor" in Section 2243, and does not contend that Section 1101(a)(43)(A) should also be interpreted to encompass the definitions of the federal crimes of "aggravated sexual abuse," 18 U.S.C. 2241; "sexual abuse," 18 U.S.C. 2242; or "abusive sexual contact," 18 U.S.C. 2244. See, *e.g.* Pet. 19. Cf. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996 (discussing both Sections 2242 and 2243). But even if the term "sexual abuse of a minor" in Section 1101(a)(43)(A) were interpreted to incorporate by reference not only the criminal "sexual abuse of a minor" statute, but the full complement of federal criminal sexual abuse statutes, it would still be considerably narrower than "the term as it commonly is used." *Id.* at 996.

tions 1227(a)(2)(A)(iii) and 1101(a)(43)(A) are not criminal statutes. They are, rather, immigration-law provisions that fall within the scope of the BIA's authority. See *Emile* v. *INS*, 244 F.3d 183, 185 (1st Cir. 2001). Petitioner cites no case to support his contention (Pet. 17-18) that the meaning of the aggravated felony definitions of the INA is beyond the BIA's expertise because a conviction for an "aggravated felony" also subjects a person convicted of unlawful reentry to enhanced sentencing under 8 U.S.C. 1326(b)(2).[3]

d. Finally, petitioner errs in contending (Pet. 19-21) that the decision below overlooked the role of the "rule of lenity" in immigration cases. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (citing "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"). Even in the criminal context, application of the rule of lenity requires more than "[t]he simple existence of some statutory ambiguity"; it requires a "grievous ambiguity" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation

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[3] *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), is not to the contrary. See Pet. 18. In *Leocal*, this Court considered whether felony driving under the influence qualifies as an aggravated felony "crime of violence" under 8 U.S.C. 1101(a)(43)(F). Unlike Section 1101(a)(43)(A), Section 1101(a)(43)(F) expressly incorporates the federal criminal-law definition of "crime of violence" in 18 U.S.C. 16. See 18 U.S.C. 1101(a)(43)(F) (defining "crime of violence" by reference to 18 U.S.C. 16); *Leocal*, 543 U.S. at 11 n.8 ("Although here we deal with § 16 in the deportation context, § 16 is a criminal statute."). The Court in any event did not consider the BIA's authority to interpret Section 1101(a)(43)(F) because the BIA had affirmed the petitioner's order of removal based solely on the relevant circuit precedent. See *id.* at 5 n.2.

marks and citation omitted). There is no such "grievous ambiguity" in Section 1101(a)(43)(A). Cf. *Taylor* v. *United States*, 495 U.S. 575, 596 (1990) (declining to apply the rule of lenity in case concerning the meaning of "burglary" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii)).

Moreover, in the INA, Congress expressly conferred on the Attorney General the authority to resolve ambiguities in the first instance. See *Aguirre-Aguirre*, 526 U.S. at 424-425; 8 U.S.C. 1103(a)(1). If courts were required to resolve any and all ambiguities in the alien's favor, that would wholly usurp the Attorney General's interpretive authority. A court thus properly considers whether statutory ambiguities should be resolved in favor of the alien only *after* the court has used every interpretative tool at its disposal, including application of deference principles under *Chevron* and *Aguirre-Aguirre*. Cf. *Negusie* v. *Holder*, No. 07-499 (Mar. 3, 2009), slip op. 5 (the "rule of lenity" may be relevant in reviewing agency action for reasonableness, but does not establish that a statute is unambiguous such that deference is unwarranted). In this case, *Chevron* principles foreclose petitioner's primary argument: that any ambiguity in Section 1101(a)(43)(A) must be resolved in favor of requiring that the alien's statute of conviction contain a physical-contact requirement. See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996.

3. Petitioner contends (Pet. 10-13) that this Court's review is warranted to resolve a conflict of authority between the decision below and decisions of other courts of appeals. The decision below is, however, consistent with the decisions of other courts of appeals that have considered similar questions under Section 1101(a)(43)(A). See, *e.g.*, *Mugalli*, 258 F.3d at 56-60;

Lara-Ruiz v. *INS*, 241 F.3d 934, 939-942 (7th Cir. 2001). And although, as petitioner notes (Pet. 5, 11), the reasoning of the court of appeals' decision is in tension with the reasoning of the Ninth Circuit's recent en banc decision in *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147 (2008), there is no square conflict on any issue raised by this case.

a. In *Estrada-Espinoza*, the Ninth Circuit held that certain state offenses involving sexual acts with a person under the age of 18 do not qualify as sexual abuse of a minor under 8 U.S.C. 1101(a)(43)(A). In reaching that conclusion, the court looked primarily to the definition of "sexual abuse of a minor" in 18 U.S.C. 2243, which, the court explained, requires: "(1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor." *Estrada-Espinoza*, 546 F.3d at 1152. The court concluded that the Section 2243 definition "comports with 'the ordinary, contemporary, and common meaning of the words' of the term," as well as "the contemporary meaning attached to the crime by a majority of the states," which generally reflect an understanding that, "although sexual activity with a younger child is certainly abusive, sexual activity with an older adolescent is not necessarily abusive." *Id.* at 1152-1153, 1155 (citation omitted); see also *id.* at 1153 ("California is joined by only about six other states in criminalizing sexual intercourse between a 21-year-old and someone about to turn 18.").

The Ninth Circuit declined to defer to the BIA's decision in *Rodriguez-Rodriguez*, concluding that "*Chevron* deference does not apply in these circumstances because *Rodriguez-Rodriguez* did not interpret a statute within

the meaning of *Chevron*, but only provided a 'guide' for later interpretation." *Estrada-Espinoza*, 546 F.3d at 1157. In the alternative, the court stated in a footnote that, even if *Chevron* applied, the BIA's interpretation would not warrant deference because "[w]hen Congress has spoken directly to the issue, as it has here, our inquiry is over and *Chevron* deference does not apply." *Id.* at 1157 n.7.

Although petitioner (Pet. 11, 13-14) appears to read the Ninth Circuit's decision to hold that the term "sexual abuse of a minor" in Section 1101(a)(43)(A) incorporates all elements of the Section 2243 definition, including its "sexual act" requirement, the matter is far from clear. The primary question in *Estrada-Espinoza* was whether state offenses that criminalized sexual activity with "someone about to turn 18" were properly characterized as sexual abuse of a minor. 546 F.3d at 1153. And although the court relied on Section 2243 in answering that question, it also emphasized its conclusion that Section 2243's age elements are in accord with the "contemporary meaning" of "sexual abuse of a minor," after reviewing the relevant provisions of the Model Penal Code and various state statutes. *Id.* at 1153-1155.

The Ninth Circuit, notably, did not have occasion in *Estrada-Espinoza* to consider whether the "sexual act" element of Section 2243 similarly reflects the ordinary, contemporary meaning of "sexual abuse of a minor" for purposes of Section 1101(a)(43)(A). The court's own discussion, however, suggests that it does not. In discussing the meaning of the term "sexual abuse," the court cited with approval prior decisions, including the Eleventh Circuit's decision in *Padilla-Reyes*, holding that "abuse" means "physical *or nonphysical* misuse or maltreatment or use or treat[ment] so as to injure, hurt, or

damage." *Estrada-Espinoza*, 546 F.3d at 1153 (quoting *United States* v. *Lopez-Solis*, 447 F.3d 1201, 1207 (9th Cir. 2006), and *Padilla-Reyes*, 247 F.3d at 1163) (emphasis added). That view of the plain meaning of the term "sexual abuse" is considerably broader than the definition of the term "sexual act" in Sections 2243 and 2246. It also suggests that the Ninth Circuit may not consider Section 2243 to supply all elements of the definition of "sexual abuse of a minor" in Section 1101(a)(43)(A).

It is also unclear that, as petitioner contends (Pet. 16), the Ninth Circuit concluded that the BIA's decision in *Rodriguez-Rodriguez* is owed no deference at all under *Chevron*. *Estrada-Espinoza* did not concern the physical-contact argument the BIA addressed in *Rodriguez-Rodriguez*, nor did *Rodriguez-Rodriguez* address the age question raised in *Estrada-Espinoza*. The Ninth Circuit's refusal to accord *Chevron* deference to *Rodriguez-Rodriguez* is thus equally consistent with the unremarkable principle that an agency's decision is owed no deference with respect to questions it does not purport to answer.

In short, although the reasoning of *Estrada-Espinoza* is in tension with the reasoning of the decision below, there is no defined conflict with respect to any question in this case. This Court's intervention therefore is not warranted at this time.

b. Petitioner also contends (Pet. 5-6, 11) that the decision below conflicts with the First Circuit's decision in *Emile*, *supra*. That is incorrect. In *Emile*, the First Circuit upheld as reasonable the Board's decision generally to "regard conduct that * * * would violate the federal sexual abuse statutes, where the victim was a minor, as 'sexual abuse of a minor'" under Section 1101(a)(43)(A). 244 F.3d at 185. In so holding, the court

made clear that "sexual abuse of a minor" is not *limited* to the Section 2243 definition of that term, but at least reaches the conduct proscribed by other federal criminal sexual abuse provisions. *Id.* at 186-187 (citing 18 U.S.C. 2241-2246). And although the court stated that "it is debatable how relevant" the definition of "sexual abuse" in Section 3509(a)(8) may be, *id.* at 186 n.2, the court did not hold that Section 3509(a)(8) is *irrelevant* to the proper interpretation of Section 1101(a)(43)(A), nor did it hold that Section 1101(a)(43)(A) is limited to offenses involving physical contact between the perpetrator and the victim.

c. Finally, petitioner suggests (Pet. 6, 13) that this Court's review is warranted to resolve a conflict regarding Sentencing Guidelines § 2L1.2, which governs sentencing for unlawful reentry in violation of 8 U.S.C. 1326. In support of his contention, petitioner cites the Ninth Circuit's decision in *United States* v. *Baza-Martinez*, 464 F.3d 1010 (2006), in which the court held that a violation of the North Carolina indecent liberties statute does not qualify as "sexual abuse of a minor" that is a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) & comment. (n.1(B)(iii)), because it does not require proof of physical or psychological harm to the victim. *Baza-Martinez*, 464 F.4d at 1017. But notably, the court expressly rejected the primary argument that petitioner advances here, concluding that "physical harm or touching is not required in order for conduct to be abusive." *Ibid.*; see also *id.* at 1015 n.1 ("[W]e have never held that 'sexual abuse of a minor' requires touching.").

In any event, this Court ordinarily does not grant review to resolve issues concerning interpretation of the Sentencing Guidelines because the Sentencing Commis-

sion can amend the Guidelines to eliminate a conflict or correct an error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* at 348; see *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Particularly because the Guidelines are now advisory, see *id.* at 245, whatever disagreements may have arisen with respect to the application of Guidelines § 2L1.2 do not warrant this Court's review. That is especially so in this case, which of course involves the interpretation of the INA, not the Guidelines.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
DONALD E. KEENER
JENNIFER J. KEENEY
Attorneys

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